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No. 81-2234

IN THE

Supreme Court of the United States

October Term, 1981

ACME QUILTING CO., INC.,
Petitioner,

vs.

PERFECT FIT INDUSTRIES, INC.,
Respondent.

MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS.

	Page
Parties to the Proceeding	1
Counter-Statement of the Questions Presented	1
Statute Involved	2
Statement of the Case	3
Reasons for Denying the Writ	6
Point I—There is no reason for review by this Court of the first appellate decision	6
The petition is untimely	10
Point II—There is no reason for review by this Court of the discretionary remedy of recall	10
Point III—There is no reason for review by this Court of the imposition of a contingent coercive fine as a remedy for willful contempt of Court	14
Point IV—There is no reason for review by this Court of the protracted factual record because of frivolous allegations of a deprivation of due process by a petitioner which has enjoyed more than its day in court but is displeased with the results below	16
Conclusion—The petition is addressed to the Court's discretion, and such discretion should not be exercised to review the decisions below	17
Appendix	19
Exhibit 1—Appendix in Appeal No. 79-7329, Pages A124-A129 and A175-A178	19
Exhibit 2—Appendix in Appeal Nos. 80-7489, 7585, 7587, Pages 196a-198a	26

Page

Exhibit 3—Affidavit of Roberta L. Jacobs dated May 7, 1981 29

Exhibit 4—1982 Committee Report of Section of Patent, Trademark and Copyright Law of the American Bar Association, Page 134 32

Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004(CBM), Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089..... 35

TABLE OF AUTHORITIES.

CASES.

American Chicle Co. v. Topps Chewing Gum, 208 F.2d 560, 563 (2d Cir., 1953)..... 9

American Optical Co. v. Rayex Corp., 291 F.Supp. 502, 504-505 (S.D.N.Y., 1967), aff'd, 394 F.2d 155 (2d Cir., 1968)..... 11,12

Andre Matenciot, Inc. v. David & Dash Inc., 422 F.Supp. 1199, 1204-1205 (S.D.N.Y., 1976) 11

Carolina Enterprises, Inc. v. Coleco Industries, Inc., 211 U.S.P.Q. 479, 488 (D.N.J., 1981)..... 11

Chevron Chemical Company v. Voluntary Purchasing Groups, Inc., 659 F.2d 695, 702-703 (5th Cir., 1981) 7

Clairol Incorporated v. Shapiro, 158 U.S.P.Q. 427 (C.D. Cal., 1968)..... 11

Commerce Foods Inc. v. P.L.C. Commerce Corporation, 504 F.Supp. 190, 193 (S.D.N.Y., 1980)..... 7

Crane Company v. American Standard, Inc., 603 F.2d 244, 253-254 (2d Cir., 1979) 4

Darby Drug Co., Inc. v. Ives Laboratories, Inc., 50 U.S.L.W. 4592 (U.S. June 1, 1982)..... 8

Page

Dawn Associates v. Links, 203 U.S.P.Q. 831, 837 (N.D. Ill., 1978) 11

Feathercombs, Inc. v. Solo Products Corp., 306 F.2d 251, 258 (2d Cir.), cert. denied, 371 U.S. 910 (1962) 8

Fisher-Price Toys v. My-Toy Co., Inc., 385 F.Supp. 218, 223 (S.D.N.Y., 1974) 11

Greenberg v. Croydan Plastics Co., Inc., 84 U.S.P.Q. 27, 28 (E.D. Pa., 1974) 11

Guaranty Trust Company of New York v. York, 326 U.S. 99, 105-106, reh. denied, 326 U.S. 806 (1945). 12

Harlequin Enterprises Limited v. Gulf & Western Corporation, 644 F.2d 946, 950 (2d Cir., 1981) 7,9

Harris Truck Lines Inc. v. Cherry Meat Packers Inc., 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) 13

Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944) 10,11

Howw Manufacturing Inc. v. Formac Inc., 213 U.S.P.Q. 793, 796 (N.D. Ill., 1981) 9

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 50 U.S.L.W. 4592 (U.S. June 1, 1982) 8,16

Jovan Inc. v. A.R. Winarick, Inc., 202 U.S.P.Q. 75, 76 (N.D. Ill., 1978) 11

Kiki Undies Corporation v. Promenade Hosiery Mills Inc., 308 F.Supp. 489, 495 (S.D.N.Y., 1969), on remand from 411 F.2d 1097 (2d Cir., 1969), cert. denied, 396 U.S. 1054 (1970) 11,12

Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2d Cir., 1956) 9

Mother's Restaurants Incorporated v. Mother's Bakery Inc., 498 F.Supp. 847, 851 (W.D.N.Y., 1980) 7

Nik-Nik Industries, Inc. v. Walt Disney Productions, Inc., 194 U.S.P.Q. 108, 110 (S.D.N.Y., 1976) 11

Page

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 502-503 (1951) 16

Rea v. Ford Motor Co., 560 F. 554, 557 (3d Cir.), cert. denied, 434 U.S. 923 (1977) 13

Santa's Workshop, Inc. v. Sterling, 282 App. Div. 328, 329-330, 122 N.Y.S. 2d 488, 489 (1953), aff'd, 3 N.Y. 2d 757, 143 N.E. 2d 529, 163 N.Y.S. 2d 986 (1957) 8

Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232, reh. denied, 376 U.S. 973 (1964) 6

Sweetarts v. Sunline, Inc., 299 F.Supp. 572, 577 (E.D.Mo., 1969), aff'd, 436 F.2d 705 (8th Cir., 1971) 11

Synercom Technology Inc. v. University Computing Company, 462 F.Supp. 1003, 1015 (N.D. Tex., 1978) 11

Syntex Laboratories, Inc. v. Norwich Pharmacal Co., 315 F.Supp. 45, 57 (S.D.N.Y., 1970), aff'd, 437 F.2d 566 (2d Cir., 1971) 11

Travelodge Corporation v. Siragusa, 228 F.Supp. 238, 241 (N.D. Ala., 1964), aff'd, 352 F.2d 516 (5th Cir., 1965) 9

United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) 4

United States v. Johnson, 268 U.S. 220, 227 (1925) 17

United States v. United Mine Workers, 330 U.S. 258, 303, 304, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947) 14,15

Page

CONSTITUTION.

United States Constitution, Amendment V:
15 U.S.C. 1125(a) 2,3,4
28 U.S.C. §1338(b) 2,4

TEXT.

Subcommittee C of Committee 205 (Unfair Competition—Trade Identity) of the Section of Patent, Trademark and Copyright Law of the American Bar Association in the 1982 Committee Reports (134) 12

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MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Parties to the Proceeding

Respondent, Perfect Fit Industries, Inc. is a subsidiary of Perfect Fit International, Inc.

Counter-Statement of the Questions Presented

Respondent submits that the questions presented for review by the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter referred to as the "Petition") should properly be stated as follows:

1.a. Whether the State of New York through the common law of unfair competition may enjoin deliberate copying of distinctive and memorable trade dress, based

on a Finding of Fact that the deliberate copying gives rise to a likelihood of confusion.

1.b. Whether the United States Court of Appeals for the Second Circuit correctly applied the New York law of unfair competition in enjoining such deliberate copying.

2. Whether a United States District Court may as a matter of equity upon careful review of a protracted factual record, order one found guilty of unfair competition in the nature of trade dress infringement to recall from its distributors the infringing trade dress and insignificant variations on the infringing trade dress.

3. Whether a United States District Court may, in the exercise of its discretion, upon careful review of a protracted factual record, impose upon a contemner having sales of 20 million dollars per year which has been found to have willfully ignored an Order of the Court, a contingent, coercive fine of $5,000.00 per day.

Statute Involved

Respondent submits that the U.S. Constitution, Amendment V, and 15 U.S.C. 1125(a) are not involved in this proceeding. The only statute involved in this proceeding is 28 U.S.C. §1338(b):

> "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws."

Statement of the Case

This proceeding involves the effort of a willful infringer who deliberately copied the distinctive, memorable and commercially successful trade dress of a major competitor to avoid the just and proper consequences of that action.

Contrary to the assertion set forth at page 3 of the Petition, Perfect Fit Industries, Inc. ("Perfect Fit") commenced this action based on the claim that Acme Quilting Co., Inc. ("Acme") had, in violation of copyright law, infringed a quilting design entitled "Le Fleur" owned by Perfect Fit. Subsequently, the Complaint was amended to claim that Acme, by copying Perfect Fit's trade dress, had violated the common law of unfair competition and 15 U.S.C. §1125(a).

After trial on the merits, the District Court entered judgment for Acme on both claims holding that Perfect Fit failed to prove secondary meaning and failed to prove that Acme engaged in a predatory practice condemned by New York State law (Appendix D to the Petition, A93-A94). The District Court found that Acme had engaged in deliberate copying at the inception of Perfect Fit's major marketing campaign to trade on the good will engendered by Perfect Fit's honest commercial activities (Appendix D to the Petition, A80).

The Second Circuit Court of Appeals reversed without dissent the judgment dismissing the Complaint and remanded so an injunction might be entered. The reversal was based on the New York common law of unfair competition. With respect to Perfect Fit's appeal from the dismissal of its claim under 15 U.S.C. §1125(a), and its contention that the District Court had erred in holding that Perfect Fit was required to establish, but had not

established, secondary meaning in its trade dress, the Court of Appeals made no finding, stating (Appendix A to the Petition, A12):

> "We conclude that under New York law, Perfect Fit was not required to prove secondary meaning in order to obtain relief from Acme's infringing trade dress. We also find that Perfect Fit made a sufficient showing of likelihood of confusion to warrant injunctive relief, but that it did not demonstrate entitlement to any other relief. We do not reach any of the other issues raised by the parties."

Acme's position that the dismissal of Perfect Fit's claim under 15 U.S.C. §1125(a) deprived the District Court of jurisdiction to resolve Perfect Fit's common law claim is simply untenable. 28 U.S.C. §1338(b) and *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) provide ample basis for the discretionary retention of jurisdiction over the state claim subsequent to trial on the merits. See, also, *Crane Company v. American Standard, Inc.*, 603 F.2d 244, 253-254 (2d Cir., 1979).

On remand, the District Court conducted an evidentiary hearing. This willful infringer* asserted to the District Court that packaging with insignificant and trivial variations was wholly new, non-infringing trade dress (Appendix E to the Petition, A101). The Court considered the variations, affidavits and memoranda submitted by the parties prior to granting on May 19, 1980 the Order, including the recall provision, subsequently affirmed by the Court of Appeals.

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* The finding of fact by the District Court that Acme deliberately copied Perfect Fit's distinctive and memorable trade dress was based on the testimony of the artist who "created" the infringing trade dress, and entailed the rejection of the testimony proferred by Acme's principal who denied the copying. Compare A124-A129 and A175-A178 in the Appendix in Appeal No. 79-7329 (Exhibit 1, annexed hereto).

This willful infringer disdained to inform itself of the provisions of the May 19 Order it knew had been entered. It brazenly alleged lack of notice as an excuse for its willful non-compliance with the Order of the District Court.

When Acme failed to comply with the May 19 Order, Perfect Fit filed a Motion for Contempt. The District Court again held an evidentiary hearing, considered memoranda submitted by the parties and carefully reviewed the protracted record in the proceeding before holding Acme in contempt and assessing a contingent, coercive fine of $5,000.00 per day for each day of non-compliance with a revised Order.

This same willful infringer delayed the hearing on the motion for contempt [196a-198a, Appendix in Appeal Nos. 80-7489, 7585, 7587 (Exhibit 2, annexed hereto)], has thwarted discovery as to the manner and extent of its compliance with the Order of the District Court entered June 24, 1980 [Jacobs Affidavit of May 7, 1981, ¶2-5 (Exhibit 3, annexed hereto)], and now raises for the first time in footnote 2 at page 9 of the Petition a myriad of unsupported excuses for its failure to comply with the letter and the spirit of such Order.

The Court of Appeals, on the second appeal, after careful review of the record, including exhibits, affirmed the award of injunctive relief and the finding of contempt without dissent. It vacated and remanded the portion of the Order relating to the contingent coercive fine, so that the District Court might explain the basis for such fine.

On remand, the District Court carefully considered all of the factors held by this Court to be appropriate (Appendix H to the Petition, A125-A132) and entered an opinion setting forth the basis for the $5,000.00 a day con-

tingent, coercive fine. On this basis (Appendix C to the Petition, A73-A74), the Court of Appeals upheld the fine as within the exercise of the sound discretion of the District Court, again without dissent.*

The petitioner before this Court is a willful infringer seeking license to perpetuate distribution and sale of product in infringing trade dress already found to create a likelihood of confusion.

REASONS FOR DENYING THE WRIT

POINT I

There is no reason for review by this Court of the first appellate decision.

The alleged question of whether an injunction may issue in an unfair competition case in the absence of secondary meaning, and in the absence of proof of actual confusion, raises no federal issue in the context of this proceeding. The Court of Appeals did not reach the question of whether any relief was justified on the basis of federal law. The Court of Appeals based its holding on New York State law.

This Court has, in any event, already decided the issue posed, and the decision of which Acme complains is consistent with this Court's holding in *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232, reh. denied, 376 U.S. 973 (1964):

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* Acme's assertion at Footnote 1 of the Petition that Perfect Fit and Acme are attempting to resolve amicably the issue of the fine is inaccurate. Perfect Fit has filed a second motion to hold Acme in contempt, and has received authorization from the District Court to employ an independent auditor to review the books and records of Acme to determine whether and to what extent Acme complied with the May 19 and June 24, 1980 Orders of the District Court.

> "Doubtless *a State may*, in appropriate circumstances, require that goods whether patented or unpatented, be labeled or that other precautionary steps be taken to *prevent customers from being misled as to* the source, just as it may protect businesses in the use of their trademarks, labels, or *distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods.* But because of the federal patent laws a state may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying." [Emphasis added].

The Second Circuit Court of Appeals found, based on New York State law, that deliberate copying of distinctive trade dress giving rise to a likelihood of confusion is subject to injunction irrespective of any finding of secondary meaning. The Court of Appeals relied upon authority both from the New York State and from the Federal courts interpreting New York State law. This interpretation of New York State law has subsequently been accepted by other courts within and without the Second Circuit. See, *Harlequin Enterprises Limited v. Gulf & Western Corporation*, 644 F2d 946, 950 (2d Cir., 1981); *Mother's Restaurants Incorporated v. Mother's Bakery Inc.*, 498 F.Supp. 847, 851 (W.D.N.Y., 1980); *Commerce Foods Inc. v. P.L.C. Commerce Corporation*, 504 F.Supp. 190, 193 (S.D.N.Y., 1980); *Chevron Chemical Company v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 702-703 (5th Cir., 1981):

> "... as the Second Circuit Court of Appeals explained in Perfect Fit Industries Inc. v. Acme Quilting Co., 618 F.2d 950, 952-953 (2d Cir., 1980), applying New York law, the number of non-functional words and symbols available for use by later comers in the

marketing of their products is unlimited. Similarly, the possible varieties of advertising display and packaging are virtually endless. *The principle question, therefore, is whether or not the public is likely to be confused, rather than the first comer's trade dress has acquired secondary meaning.*" [Emphasis added].

With respect to the New York law of unfair competition, this law is and has been established. See, *Santa's Workshop, Inc. v. Sterling*, 282 App. Div. 328, 329-330, 122 N.Y.S. 2d 488, 489 (1953), aff'd, 3 N.Y. 2d 757, 143 N.E. 2d 529, 163 N.Y.S. 2d 986 (1957); *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251, 258 (2d Cir.), cert. denied, 371 U.S. 910 (1962). There is simply no need for this Court to resolve a question of state law or to determine whether the Court of Appeals correctly applied state law to the established facts of the proceeding.

Reversal of the established principles of unfair competition law in the State of New York would lead to the unwarranted and unacceptable situation in which a speedy "knock-off" artist occupies a more favorable position than a less fleet "knock-off" artist, although the activities of both create a likelihood of confusion and constitute an unwarranted invasion of property rights in distinctive and memorable trade dress.

Inwood Laboratories, Inc. v. Ives Laboratories, Inc. and *Darby Drug Co., Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (U.S. June 1, 1982) relied on in the Petition are wholly inapposite. Neither the issues presented in the *Ives* petitions (fair use of another's mark; rights in a product's color *per se*; circumstances in which generic drug manufacturers may be held vicariously liable for infringement by pharmacists who dispense the generic drug) nor the issues reached by this Court in the *Ives*

cases (failure of the Court of Appeals to give due deference to District Court's findings of fact) are related to the subject issues, namely, a factual finding of deliberate copying of trade dress found to be distinctive and memorable giving rise to a likelihood of confusion. In addition, what *Ives* did not involve and the instant case does involve is New York State's common law of unfair competition.

The tect of unfair competition is not and has never been actual confusion. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir., 1956). Also, courts have consistently found substitutes for traditional proofs of "secondary meaning" to enjoin deliberate acts of unfair competition. See, *e.g.*, *Harlequin Enterprises Limited v. Gulf & Western Corporation*, 644 F.2d 946, 950 (2d Cir., 1981); and *Howw Manufacturing Inc. v. Formac Inc.*, 213 U.S.P.Q. 793, 796 (N.D. Ill., 1981):

> "The other way in which secondary meaning has been established in trade cases is by raising a presumption of secondary meaning where it is shown that a junior competitor has 'deliberately and closely imitated plaintiff's trade dress.' Scholl, Inc. v. Tops E.H.R. Corp., 185 U.S.P.Q. 754, 758 (E.D.N.Y. 1975); Clairol, Inc. v. Cosway Co., Inc., 184 U.S.P.Q. 583 (C.D. Cal. 1974)."

See, also, *American Chicle Co. v. Topps Chewing Gum*, 208 F.2d 560, 563 (2d Cir., 1953); *Travelodge Corporation v. Siragusa*, 228 F.Supp. 238, 241 (N.D. Ala., 1964), aff'd, 352 F.2d 516 (5th Cir., 1965).

The petition is untimely.

The petition was filed out of time with respect to the propriety of the finding of liability on the basis of New York State law. The question of liability, as opposed to the question of remedy, was finally decided by the Second Circuit Court of Appeals on February 26, 1980. Since more than 90 days have passed since the entry of such judgment, the petition is not timely and should be denied on that basis alone.

POINT II

There is no reason for review by this Court of the discretionary remedy of recall.

The gist of the Petitioner's second point is unclear. However, whether the issue claimed is the validity of recall or merely abuse of discretion, the issue is not one which warrants review of this proceeding by this Court.

The second point raised in the Petition relates to the decisions with respect to an equitable remedy entrusted initially to the discretion of the District Court. As the Court of Appeals noted (Appendix B to the Petition, A44):

> "It is well settled that the district court's equity jurisdiction empowers it 'to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U.S. 21, 329, *et al.*, 64 S.Ct. 587, 88 L.Ed. 754 (1944) . . ."

In the instant proceeding, the District Court rendered the decision which is the subject of Point II based on a thorough familiarity with an extended factual record. Key elements of this factual record bearing on the exercise of discretion by the District Court are not fairly set forth in the Petition. See pages 3 to 6, *supra*.

There is, in any event, no Federal statutory or Constitutional question to be reviewed by this Court.

Notwithstanding the contention in the Petition at page 8 that no prior federal appellate court has "authorized" the remedy of a recall, *Hecht, supra*, is precedent that recall is a remedy within the discretion of the District Court. See, also, *Sweetarts v. Sunline, Inc.*, 299 F.Supp. 572, 577 (E.D.Mo., 1969), aff'd, 436 F.2d 705 (8th Cir., 1971). *Syntex Laboratories, Inc. v. Norwich Pharmacal Co.*, 315 F.Supp. 45, 57 (S.D.N.Y., 1970), aff'd, 437 F.2d 566 (2d Cir., 1971).

There is also unchallenged authority from the District Courts granting recall as a discretionary remedy based upon the facts in each proceeding. *Kiki Undies Corporation v. Promenade Hosiery Mills Inc.*, 308 F.Supp. 489, 495 (S.D.N.Y., 1969), on remand from 411 F.2d 1097 (2d Cir., 1969), cert. denied, 396 U.S. 1054 (1970); *Clairol Incorporated v. Shapiro*, 158 U.S.P.Q. 427 (C.D. Cal., 1968); *Greenburg v. Croydan Plastics Co., Inc.*, 84 U.S.P.Q. 27, 28 (E.D. Pa., 1974); *Jovan Inc. v. A.R. Winarick, Inc.*, 202 U.S.P.Q. 75, 76 (N.D. Ill., 1978); *Dawn Associates v. Links*, 203 U.S.P.Q. 831, 837 (N.D. Ill., 1978); *Carolina Enterprises, Inc. v. Coleco Industries, Inc.*, 211 U.S.P.Q. 479, 488 (D.N.J., 1981). *Cf. Synercom Technology Inc. v. University Computing Company*, 462 F.Supp. 1003, 1015 (N.D. Tex., 1978); *Nik-Nik Industries, Inc. v. Walt Disney Productions, Inc.*, 194 U.S.P.Q. 108, 110 (S.D.N.Y., 1976); *Andre Matenciot, Inc. v. David & Dash Inc.*, 422 F.Supp. 1199, 1204-1205 (S.D.N.Y., 1976); *Fisher-Price Toys v. My-Toy Co., Inc.*, 385 F.Supp. 218, 223 (S.D.N.Y., 1974); *American Optical Co. v. Rayex Corp.*,

291 F.Supp. 502, 504-505 (S.D.N.Y., 1967), aff'd, 394 F.2d 155 (2d Cir., 1968).*

No New York State Court has ever ruled that recall is not a permissible remedy in appropriate circumstances. That no reported New York State case has ordered a recall of infringing trade dress is of no significance. As this Court has held, the United States courts, considering a claim based on state law, are not restricted to the remedies which the state courts have applied. See, *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 105-106, reh. denied, 326 U.S. 806 (1945).

The argument that Acme should not be penalized for "acting in accordance with the District Court's order" (Petition at p. 7) misstates the facts. Acme acted after the May 19 Order was entered as it had acted before the Order, in disregard of the property rights of Perfect Fit. Notwithstanding the District Court's findings of fact that Acme had deliberately copied Perfect Fit's trade dress which it termed distinctive and memorable, and notwithstanding the pendency of Perfect Fit's appeal, Acme continued to engage in unfair competition. It proceeded at its own risk in these circumstances. The District Court's initial error of law cannot insulate Acme from the imposition of a remedy designed to terminate as rapidly as possible the likelihood of consumer confusion, deception and mistake created by Acme's deliberate misconduct. See, *Kiki Undies Corporation v. Promenade*

* Subcommittee C of Committee 205 (Unfair Competition—Trade Identity) of the Section of Patent, Trademark and Copyright Law of the American Bar Association in the 1982 Committee Reports (134) "considers recall a proper remedy in the appropriate circumstance and that this remedy is available to a court under its equitable powers to protect the public from confusion and the interests of competitors." (Exhibit 4, annexed hereto).

Hosiery Mills Inc., 308 F.Supp. 489, 493 (S.D.N.Y., 1969), on remand from 411 F.2d 1097, 1101. *Cf., Rea v. Ford Motor Company*, 560 F.2d 554, 557 (3d Cir.), cert. denied, 434 U.S. 923 (1977).

Harris Truck Lines Inc. v. Cherry Meat Packers Inc., 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962), relied on by Acme, is inapposite. That case did not hold that an erroneous ruling by a District Court can determine substantive rights, but dealt with the deference due a District Court's finding of "excusable neglect" under former Rule 73.

Any prohibition of recall as a discretionary remedy would encourage infringers to dump on the market or transfer title to infringing goods between the rendering of the decision and the entry of the injunction. These infringers would be secure in the knowledge that such goods may remain on the market for months or even years after a Court has ruled that the complaining party is entitled to injunctive relief to prevent likely confusion of the public and/or the trade. This result is unwarranted, particularly where, as here, the infringer has proceeded deliberately to copy its competitor's distinctive and memorable trade dress.

POINT III

There is no reason for review by this Court of the imposition of a contingent coercive fine as a remedy for willful contempt of Court.

Acme's third point in its Petition, the propriety of the punishment for contempt, rests on certain assumptions of fact with respect to Acme's finances which have never been subject to cross-examination but are subject to challenge, particularly with respect to Acme's alleged average daily earnings and alleged net profit.*

The factual situation in the case is more complex than indicated by Acme in its Petition. Acme had the power to avoid the fine entirely or end its accrual at any time, if it chose to, by complying completely with the Order of June 24, 1980.

Acme does and cannot challenge the law applied by the Court of Appeals. It only challenges the manner in which the facts of record were weighed by the two courts below (Appendix H to the Petition, A125-A132).

Acme seeks review of the unanimous decision of the Court below, by focusing on only one criterion of those previously enumerated by this Court in *United States v. United Mine Workers*, 330 U.S. 258, 303, 304 (1947). Both courts below carefully considered all the pertinent criteria in context. Acme in effect contends that the other factors must all be subordinated to the question of

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* See the testimony of Acme's principal at the retrial of Acme's counterclaims, 794; 800; 816-820; 833-835; 841-844; 850; 1084; 1089 (Exhibit 5, annexed hereto). Acme's statement of income and retained earnings for the year ended January 31, 1979 lists a gross profit on sales of in excess of 3.1 million dollars, an increase over the previous year's gross profit in excess of .6 million dollars.

contemner's "financial resources", measured only by alleged net profits. Acceptance of this contention would preclude courts from fashioning effective sanctions where the contemner is either financially troubled, and/or where the contemner has so arranged its books that little net profit is shown. A closely held corporation, such as Acme, may have substantial continuous gross sales and significant financial resources, and show little daily profit. Daily net profit does not necessarily reflect the financial condition of the contemner more accurately than gross sales.

At the retrial of Acme's counterclaim, Acme's principal testified (T1089):

> "We have to keep in mind that while Acme Quilting Company, Inc. is a viable organization it is essentially a selling organization and how it does must take into consideration the operations of the manufacturing affiliates."

This Court has expressly found that in assessing punishment for contempt, the courts should in the exercise of discretion look to the "financial resources" of the contemner, *inter alia*. *United States v. United Mine Workers, supra*. There is no sound reason in law or logic to limit "financial resources" to net profits of a closely held company which has numerous related companies.

On the extended factual record developed in this proceeding, the result reached by the District Court and unanimously affirmed by the Court of Appeals is discretionary and eminently fair.

POINT IV

There is no reason for review by this Court of the protracted factual record because of frivolous allegations of a deprivation of due process by a petitioner which has enjoyed more than its day in court but is displeased with the results below.

There is simply no basis for the allegation in Point IV of the Petition that any of the rulings of the District Court affirmed by the Court of Appeals were "patently unfair". A complete refutation of the allegation, however, would entail an exhaustive review of a factual record created over a four year period and encompassing several lengthy appendices, numerous evidentiary hearings, and the testimony of numerous witnesses all observed by the same District Judge. Such a review would be inappropriate. *Cf., NLRB v. Pittsburgh S.S.Co.*, 340 U.S. 498, 502-503 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues. This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

Cf. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., supra.

CONCLUSION

The Petition is addressed to the Court's discretion, and such discretion should not be exercised to review the decisions below.

Acme in its Petition presents no substantial federal question.

Acme in its Petition seeks to have this Court review rulings on discretionary matters without pointing to any abuse of discretion.

The only real question Acme raises in its Petition turns on the particular facts of this case alone, and is of interest only to the parties to it. In essence, Acme in its Petition has asked this Court to make a third review of the lengthy trial and post-trial record to see if it can find what two previous courts have been utterly unable to find, good faith by Acme sufficient to relieve it of the obligation to take appropriate steps to terminate the probability of confusion created by its intentional copying of Perfect Fit's distinctive and memorable trade dress. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. See, *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight.

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

PERFECT FIT INDUSTRIES, INC.

By _____

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APPENDIX

EXHIBIT 1

**Appendix in Appeal No. 79-7329,
Pages A124-A129 and A175-A178**

[A00124] IRA KRAMER, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Seidel:

Q. What is your home address? A. 399 Ocean Parkway, Brooklyn, New York.

Q. What is your profession, Mr. Kramer? A. I am an artist.

Q. And have you worked for Acme Quilting, the defendant in this law suit? A. Well, did I design for them? Is that what you mean?

Q. Yes. A. Yes.

Q. And in fact did you design the J. board, Plaintiff's Exhibits 2 and 3, which I show you? A. Yes.

Q. And did you in fact submit this bill. Plaintiff's Exhibit 99, and this bill, Plaintiff's Exhibit 100, for this design work? A. That's correct.

Q. Could you tell us how you came to design these two J boards, Plaintiff's Exhibits 2 and 3? A. I was called by Acme to design a J board for a new [A00125] product.

Q. What did you do then? A. I made some sketches for the product. I saw what the J board was, which I had had no experience with before, and I designed the product around it.

Q. Were you given anything by Acme when you made the design initially? A. Initially, no.

Q. And were your initial sketches accepted by Acme? A. No.

Q. Were you then given a J board of the plaintiff exemplified by Plaintiff's Exhibit 1? A. I was shown that.

Q. And, having been shown Plaintiff's Exhibit 1, did you design Plaintiff's Exhibits 2 and 3? A. Yes.

Q. Plaintiff's Exhibit 2 has the word "Original" on the product. Whose idea was it to put that on the exhibit? A. It came from Acme.

Q. I show you the type font on Plaintiff's Exhibit 1. Did you consult BedSack's J board, Plaintiff's Exhibit 1, before doing this work? A. That's hard to say. It could have been a subconscious reaction from it.

[A00126] Q. And how about the art deco frame? Is this an art deco frame, by the way? A. You could call it that.

Q. It is a double frame, one being silver and the other being gold. A. The colors are incorrect. This is the reason it was never used, to my knowledge, the colors on PX 2.

Q. The colors appearing on PX 3 are correct? A. Yes.

Q. Which color is closer to PX 1, to your trained eye? A. This is closer PX 3.

Q. Had you, prior to seeing PX 1, ever seen a J board or any photograph taken from this angle? A. Yes.

Q. Let me finish. —showing a mattress cover on a mattress and a mattress cover on a pad? A. This is a new item. I have seen photographs of a bed in this angle on previous quilt covers that I purchased, myself.

Q. But you have never seen one covering both mattress and box spring, have you? A. I don't recall.

Q. Have you ever seen an insert for a mattress cover [A00127] having a double frame, as shown in PX 1 and PX 3? A. I can't say.

Q. PX 1 is die cut; in other words, it is cut right along the edge; is that right? A. That's correct.

Q. PX 3 is not die cut? A. That's correct.

Q. But is it made to simulate the die cutting by putting a white border around the frame? Do you have an opinion? A. No.

Q. Were you paid for the design of PX 3?

The Court: It's 2, isn't it?

Mr. Seidel: This is 3. This is the one they are selling in large volume.

The Court: It's 2 that was not used, then?

The Witness: That's correct.

Mr. Seidel: I think there were small sales, yes.

The Court: Well, we all said 3, and we are looking at 2.

Read the last question.

(Record read.)

A. Both of these designs were on one bill.

Q. And were they satisfied with this design? [A00128] A. They accepted it.

Q. And they were not satisfied with the earlier designs that you had prepared prior to seeing PX 1; is that correct? A. That's correct.

Mr. Seidel: I have no further questions. You may cross examine.

CROSS EXAMINATION by Mr. Roberts:

Q. Mr. Kramer, you said that Acme was not satisfied with the first designs? A. That's correct.

Q. Were you told why? A. Yes.

Q. Would you tell us why? A. They didn't meet the quality and the feeling that the BedSack J board insert had.

Appendix—Exhibit 1—Appendix in Appeal No. 79-7329, Pages A124-A129 and A175-A178.

Q. You said also you were given a package like PX 1. A. The BedSack is PX 1?

Q. Yes. A. I was given not the package, but I was shown the insert. I was not given it.

The Court: You mean the J board?

The Witness: The J board.

[A00129] Q. Were you only given the J board of Plaintiff's Exhibit 1? A. Yes.

Q. Were you given anything else at the same time? A. I was given a sample of Acme's product.

Q. And were you given samples of other art work? A. I don't know what you mean.

Q. Well, you were handed only the J board of Plaintiff's Exhibit 1, or were you given art work relating to other possible inserts? A. I was shown just J board 1.

Q. Were you asked to copy the J board of Plaintiff's Exhibit 1? A. The term was never used: copy.

Q. Was it suggested that you copy from Plaintiff's Exhibit 1? A. No.

Q. Did Acme's personnel ever inform you that they wanted to keep their own product distinguishable as an Acme product? A. Yes.

Q. How was this suggested to you? A. It was suggested by showing me all of the items that they had before, and I was given these as a sample

* * *

[A00175] which is in Plaintiff's Exhibit 3 and the J board which is in Plaintiff's Exhibit 2, which I show you? A. I don't know what you mean by did I arrange—

Q. Did you work with the artist, Mr. Ira Kramer, for example? A. Mr. Ira Kramer prepared the design. I ultimately approved it.

Appendix—Exhibit 1—Appendix in Appeal No. 73-7329, Pages A124-A129 and A175-A178.

Q. Did you have a number of meetings with Mr. Kramer? A. I had several meetings with Mr. Kramer, yes.

Q. Isn't it a fact that the initial designs which he gave you you didn't approve? A. That's correct.

Q. And then didn't you give him a sample of the plaintiff's J board, PX 1? A. No, that's not quite correct.

You want me to tell you how it came about?

Q. Yes, why don't you tell me your recollection. The Court has heard Mr. Kramer's statement. A. Mr. Kramer had been employed by Acme for a period of time and had produced a number of package designs for us and at the time we had somewhat of a library of our products, competitors' products and particularly [A00176] products in the domestic field. I believe all of that was available to Mr. Kramer and I believe Mr. Kramer used it in the preparation of his first couple of submissions.

We did at the time have at least one BedSack in the office and when I rejected Kramer's initial sketches and he asked me why, I said that they didn't express the meaning of the product or the intent of the product nearly as well as the BedSack, and I told Kramer that I would like him to get me or prepare for me an insert that would at least arrive at the quality of expression and perhaps improve the quality of expression of the product that was depicked on the BedSack, but I also told him at the same time to make sure that there were substantial differences so that they could be told apart, I didn't want any confusion between the Acme product and the Perfect Fit product.

Q. And that is your sworn recollection as to what happened with Mr. Kramer? A. Yes.

Appendix—Exhibit 1—Appendix in Appeal No. 79-7329, Pages A124-A129 and A175-A178

Q. Were you examined prior to this trial on February 21, 1978 by Mr. Joel Goldhammer of my office? A. Yes.

Q. Were you asked, at Page 58:

> "Q. In your meetings with Mr. Kramer was there any reference to the BedSack trademark? A. I don't recall.
>
> Q. Was there any reference to any of BedSack's advertising materials? A. I don't recall.
>
> Q. Did you discuss BedSack's J board? A. I don't recall.
>
> Q. Did you discuss the type of lettering that Perfect Fit was using for its BedSack trademark? A. I don't recall."

How come your memory is so much better today, which is eight months or seven months later, than it was on February 21, 1978? A. Well, I think you have recalled a number of questions, some of which are on point and some of which are not. So if you want to go over it item by item, perhaps I can give you an answer.

You listed about five questions and answers that I don't recall.

Q. Let's go over them again. You were asked:

> "Q. In your meetings with Mr. Kramer was there any reference to the BedSack trademark? A. I don't recall."

[A00178] Do you recall that now or don't you? A. Not particularly.

Q. (Reading)

> "Q. Was there any reference to any of BedSack's advertising materials? A. I don't recall."

A. Again, not particularly.

Appendix—Exhibit 1—Appendix in Appeal No. 79-7329, Pages A124-A129 and A175-A178

Q. But then comes:

"Q. Did you discuss BedSack's J board? A. I don't recall."

Just a few moments ago you said you showed this to Mr. Kramer and told him you wanted to make something that wasn't like that.

Now, which of these is accurate, what you said on Febrauary 21 or what you just said a few moments ago. A. They happen to be both accurate, even though they might seem strange. At the time I didn't recall. Mr. Kramer subsequently came in the office, he had done work for us, and I asked him and he asked me.

Q. You mean subsequent to February 21, 1978? A. Yes.

Q. And that's the reason you testified before, because he refreshed your recollection?

* * *

EXHIBIT 2

Appendix in Appeal Nos. 80-7489, 7585, 7587, Pages 196a-198a

[196a] of your senior partner. Here are the papers. I didn't have time to photocopy all the exhibits, but I know you have them.

The Court: The long and short of all this is you don't have the stay, is that it?

Mr. Levy: One other thing. Just as she was too busy preparing for this to appear on the stay application—and I may have a stay, I don't know, as of now, if I have it or not—

The Court: Your partner, Mr. Schindler—

Mr. Levy: He isn't my partner.

The Court: —your associate was here, and I was going to hear it, at five minutes to two.

Mr. Levy: He was here at two o'clock.

The Court: I said he was here at five minutes to two, and I was. He advised me he thought you were getting a stay. I gave him permission to go upstairs and see if you had gotten a stay. He came back and said you didn't have a stay but had left your briefcase in the clerk's office and wanted time to get that, and I gave him time to get that.

You are here now telling me you don't have a stay, you think you may have a stay, and this hearing was scheduled for two o'clock. It's now three o'clock.

[197a] Mr. Levy: If your Honor will not honor the request of the clerk of the United States Court of Appeals for the Second Circuit—

The Court: The point is that you were not here to proceed at two o'clock.

Mr. Levy: Because I was upstairs. I couldn't be in two places.

The Court: The point is you didn't have a stay at two o'clock.

Mr. Levy: I was there before two o'clock, and the clerk's office didn't have anybody there to deal with it.

The Court: You were due here at two o'clock in that situation because you didn't have an excuse not to be here at two o'clock. In the absence of a stay from the Court of Appeals, you were bound to be here at two o'clock and not have me sitting on the bench waiting for you to come down from the Court of Appeals when you got ready to come down.

Mr. Levy: Your Honor, Mr. Schindler is the attorney of record. He was here.

The Court: While we are on this I am going to adjourn it to 12:45 on Monday only because it is now three o'clock and I have another matter that has to proceed. [198a] That's the only reason it is not going forward right now, Mr. Levy.

You didn't have a stay from the Court of Appeals, and this was due to be heard, as I said, at two o'clock. You were not here. You still don't have a stay. So this hearing is simply adjourned until 12:45 on Monday.

In connection with this whole proceeding, you will recall when you were here the other day I said to you that your clients you now represent, Acme, have in the past caused delay in these proceedings that are really now bifurcated into an injunction hearing and a libel and slander action.

Appendix—Exhibit 2—Appendix in Appeal Nos. 80-7489, 7585, 7587, Pages 196a-198a.

You will recall I pointed out to you that on prior occasions Mr. Ratner, the head of this company, had failed to pay his attorneys, and I had granted them leave to withdraw.

Do you remember that, a discussion to that effect?

Mr. Levy: I remember that.

The Court: Now, I have the orders relating to that, and I am going to have them marked in connection with this and made a part of the record on this application for a stay which you made here.

EXHIBIT 3

Affidavit of Roberta L. Jacobs dated May 7, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PERFECT FIT INDUSTRIES, INC.,

Plaintiff,

v.

ACME QUILTING CO., INC.,

Defendant.

Civil Action No. 77-Civ. 2004 (CBM)

AFFIDAVIT OF ROBERTA L. JACOBS

Roberta L. Jacobs, being duly sworn, deposes and says as follows:

1. I am a member of the firm of Seidel, Gonda, Goldhammer & Panitch, P.C., counsel to plaintiff Perfect Fit Industries, Inc. in connection with the issues raised by the Complaint in this proceeding.

2. Subsequent to the entry of the Order of June 24, 1980 by this Court, and while appeal was pending from such Order, Arthur H. Seidel, and I attempted to ascertain the manner and extent of compliance by Acme Quilting Co., Inc. with such order.

Appendix—Exhibit 3—Affidavit of Roberta L. Jacobs dated May 7, 1981.

3. While some information was forthcoming from counsel for Acme Quilting Co., Inc., other information requested concerning compliance with the Order was not supplied.

4. Counsel for Acme Quilting Co., Inc. has refused to make his client available for deposition on the issue of compliance.

5. Annexed hereto as Exhibits A-G hereof are the following items of correspondence relating to efforts on behalf of Perfect Fit Industries, Inc. to ascertain the manner and extent of compliance by Acme Quilting Co., Inc., with the Order of this Court entered May 19, 1980, as amended by this Court's Order of June 24, 1980:

A July 11, 1980—From Arthur H. Seidel to Herbert Monte Levy

B July 21, 1980—From Herbert Monte Levy to Arthur H. Seidel

C August 26, 1980—From Roberta L. Jacobs to Herbert Monte Levy

D September 15, 1980—From Roberta L. Jacobs to Herbert Monte Levy

E September 24, 1980—From Roberta L. Jacobs to Herbert Monte Levy

F September 25, 1980—From Herbert Monte Levy to Roberta L. Jacobs

G September 30, 1980—From Herbert Monte Levy to Roberta L. Jacobs

Appendix—Exhibit 3—Affidavit of Roberta L. Jacobs dated May 7, 1981.

6. The legal costs necessarily incurred by Perfect Fit in prosecuting the contempt of this Court's May 19, 1980 Order through June 24, 1980 totalled $4,328.50. A breakdown of these costs by attorney, time spent and rate is annexed hereto as Exhibit H.

7. The legal costs necessarily incurred by Perfect Fit in connection with the contempt proceeding subsequent to the entry of this Court's Order Of June 24, 1980 through March 31, 1981 totalled $8,795.00. A breakdown of these costs is annexed hereto as Exhibit I.

ROBERTA L. JACOBS
Roberta L. Jacobs

State of Pennsylvania
County of Philadelphia } ss

Sworn to and subscribed before me this 7th day of May, 1981.

SHIRLEY M. BLOCK
Notary Public, Philadelphia Co.
My Commission Expires June 11, 19____

EXHIBIT 4

1982 Committee Report of Section of Patent, Trademark and Copyright Law of the American Bar Association, Page 134

205 Unfair Competition-Trade Identity

* * *

beyond the scope of the Subcommittee's assigned topic, those members of this year's Subcommittee who addressed the question also endorsed that concept. On the theory that half a load is better than none, however, the Subcommittee nevertheless endorses amendment of §43(a) in the more limited respect referred to in the Proposed Resolution, above.

SUBCOMMITTEE C. DOUGLAS W. WYATT,
Subcommittee Chairman

Subject 5. RECALL AS A REMEDY.

NO PROPOSED RESOLUTION.

Past Action. None.

Discussion. In the recent case of *Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc.*, 646 F.2d 800, 210 U.S.P.Q. 175 (2d Cir. 1981), the Second Circuit Court of Appeals upheld the decision of the District Court for the Southern District of New York (484 F.Supp. 643, 203 U.S.P.Q. 481) that the defendant send recall letters as part of the relief in an action for unfair competition based on evidence that the defendant had intentionally copied plaintiff's trade dress, which was likely to cause confusion among customers.

The court cited with approval prior decisions ordering recall of offending mechandise. These include *Clairol, Inc.*

v. Shapiro, 328 F.Supp. 881, 158 U.S.P.Q. 427 (C.D. Cal. 1968), and *Kiki Undies Corp. v. Promenade Hosiery Mills, Inc.*, 308 F.Supp. 489, 164 U.S.P.Q. 117 (S.D.N.Y. 1969).

The Subcommittee considers recall a proper remedy in the appropriate circumstance and that this remedy is available to a court under its equitable powers to protect the public from confusion and the interests of competitors.

It is not seen that a resolution or other action concerning recall as a remedy is required by the Section of Patent, Trademark, and Copyright Law at this time.

Members approving Report:

Amend, James M.
Baber, Bruce W.
Benziger, Robert A.
Cislo, Donald M.
Dillon, Joan L.
Driscoll, Marie V.
Drobile, James A.
Ehrlich, David W.
Fetterley, Daniel D.
Fried, Stewart J.
Gerhart, Peter M.
Gertmenian, Russell M.
Gifford, Ernest I.
Hardin, Harry S.
Hennessey, Gilbert H.
Johnson, Jamie
Kaul, Donald A.
Kranzow, Ronald R.
Kunin, Louis
Lee, William M.
McAuliffe, Jeremiah D.
McCabe, Edward T.
McIlhenny, Edmund
O'Rourke, Thomas A.
Pierluisi, Jorge A.
Price, Bradford R. L.
Price, Griffith B.
Progoff, Susan
Rashopf, Robert L.
Renault, Phillips M.
Rodgers, Walter A.

Appendix—Exhibit 4—1982 Committee Report of Section of Patent, Trademark and Copyright Law of the American Bar Association, Page 134

Scagnelli, John M.
Shaw, Philip M.
Silver, Robert D.
Slonecker, Michael L.
Spath, Gregg A.
Stein, Irving N.
Turner, James E.
Wyatt, Douglas W.

Members not heard from:

Andrias, Richard T.
Bloom, Michael A.
Brezina, John C.
Carroll, Leo R.
Clair, Frank X.
Colbert, Clarence J.
Cooney, William J.
Crebs, P. Terence
Gottfried, Philip H.
Heftner, Laurence R.
Henderson, Kenneth L.
Hoyt, Nancy V.
Kaye, Harvey
Miller, James W.
Nation, Floyd R.
Turner, James E.
Wolff, Stephen S.

EXHIBIT 5

Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM), Pages 794, 800, 816-820, 833-835, 841-844, 850, 1064 and 1089

[794] yourself? A. We absorbed the additional cost; yes.

Q. Now, Mr. Rattner, you've heard a lot of testimony with respect to statements, the accusations made by Mr. Levine about Acme.

Has Acme been damaged, sir, as a result of that?

Mr. Gordon: I object, if your Honor please. It calls for a conclusion on the part of the witness. This is an issue for jury determination.

The Court: Yes, I'll sustain that. I assume you're going to evidentiary matters.

Q. Well, what has happened to Acme, Mr. Rattner, since March and April of 1977?

Mr. Gordon: I object, if your Honor please. It's far too broad to call for a specific answer.

The Court: Well, I think we all know where we are going.

Overruled.

A. In 1976, before these accusations were made, Acme enjoyed approximately 20 to 25 per cent of the mattress pad market in the country.

Ever since these accusations were made, we have—

* * *

[800] A. During the same period, '77, '78 and '79.

If we took $15 million and made it $29 million as a result of a lost market position and add the inflation rate of 30 per cent to that, we would have an additional $5 million in sales. So between the two, in 1979 our loss of

sales which I said was eight could have been as high as ten million dollars.

Q. And what would be the profit that would be lost by your company on a loss of sales of eight to ten million dollars?

Mr. Gordon: Objection, if your Honor please, what would be without any basis, without any function.

The Court: Sustained. You have to establish what the profit rate of this company is, two and a half or whatever?

Q. Could you answer that question? A. Thank you. We work on a markup of approximately 25 to 28 per cent. Inasmuch as our basic overhead would be covered by current sales, an increase in volume $10 million would have given us a minimum of $2.5 million profit.

Q. And that would be simply for the year—

Mr. Gordon: Your Honor, I move again to

* * *

[816] hasn't been laid through this witness for overcoming that.

The Court: Well, this witness adopts them as substantially accurate.

I will overrule the objection.

It will be received in evidence.

(Perfect Fit's Exhibit 16 was received in evidence.)

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

By Mr. Gordon:

Q. Now, sir—

The Court: Mr. Rattner, would you please hand me the exhibit?

The Witness: Yes, sir (handing to the Court).

The Court: Go ahead, Mr. Gordon.

By Mr. Gordon:

Q. Now, sir, I am going to ask you some questions and feel free to use Exhibit 16 if you need it to refresh your recollection. A. Thank you.

Q. What were the sales of Acme Quilting Company in its fiscal year ended 1976? A. $18 million.

Q. And on these $18 million in sales, how much in net profit did the company earn? A. Well, this figure here is incorrect. We [817] earned a net profit of about 170-odd thousand dollars.

Q. And you say that when the report sets it forth as $19 million, that's incorrect? A. $90,000.

Q. Excuse me, $90,000.

You say that they are incorrect? A. I believe what they have done—and I can't be certain of that. I believe that they have taken off the taxes paid. So the net profit before taxes as I recall, is somewhere around 170-odd thousand dollars. This must be net profit after taxes.

Q. All right. Well, if you make net profits, you pay tax on them, don't you?

The Court: Yes, Mr. Gordon.

Let's go on, please.

By Mr. Gordon:

Q. Now, Mr. Ratner, in your fiscal year ended January 31, 1980, what were the total sales of Acme?

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

Mr. Kreindler: I will object to the question with respect to comparing the fiscal year January 31, 1976 with 1980.

The Court: I will permit it.

Mr. Kreindler: That's a year and four months before the events took place.

[818] The Court: Mr. Kreindler, I understand. These figures are all in evidence. So they all may be referred to as any time.

A. $22 million.

Q. All right. Then what was the increase in the sales of Acme during that four-year period of time? A. They increased from $18 million in '76 to $20 million in '77, to $20 million in '78, to $22 million in '79, and to $22 million in 1980.

Q. So, did you have an increase of approximately $4 million in your sales over a four-year period of time? A. That's correct.

Q. And would you, as chief financial officer, Mr. Rattner, be able to calculate the percentage of increase in the Acme sales over that four-year period of time? A. Yes, I—

Mr. Kreindler: I will object. It is not a four-year period, it is a five-year period we are talking about.

Mr. Gordon: Correct. I will adopt that.

A. I would like to point out that you are talking about a period ending January 31, 1976—

[819] Q. Yes, sir. A. —which really related to our business in 1975, you are aware of that?

Q. Oh, yes. A. Oh, okay.

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

Q. And if it will make you more comfortable, make the comparison for the four-year period, from your fiscal year '76 to your fiscal year '79.

Was it increased in that four-year period—

Mr. Kreindler: '76 or '77?

Mr. Gordon: January 31, 1976, year-end, fiscal year, to January 31, 1979, year-end, fiscal year.

Q. Did Acme sales increase by $4,700,000? A. Yes, they did.

[820] Q. And does that represent a percentage increase in excess of 25 per cent, sir? A. That does, yes, sir.

Q. So your sales over that four-year period of time—withdrawn.

Now, as far as the net profit after taxes—

Mr. Kreindler: If your Honor please, I'm sure that Mr. Gordon isn't attempting to—

The Court: Mr. Kreindler, you can handle these things on redirect examination.

He's asking perfectly legitimate questions.

Mr. Kreindler: About periods that are not relevant. He's turning the periods around.

The Court: All right, you can argue that hereafter. That's overruled.

Go ahead, Mr. Gordon.

BY MR. GORDON:

Q. What was your net profit after taxes in the year-ended January 31, 1976, when you did $18 million in sales?

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

The Court: You can bring that out on redirect if you wish, Mr. Kreindler.

Mr. Kriendler: Yes, sir.

A. After taxes, $90 million—$90,000. I'm

* * *

[833] attributable to the adult mattress pads? A. Yes.

Q. Did you also have a couple of retail outlets? A. No.

Q. Do you have retail outlets now? A. No.

Q. Have you ever heard of two retail stores called Bedspread Warehouse down in Florida? A. Yes.

Q. Are they owned by Acme? A. No, sir.

Q. Are they owned by the same people who are the principals of Acme? A. Partly.

Q. Are you one of the owners? A. Yes, I am.

Q. This factory that Acme has in Hanover, Pennsylvania, that we have heard about, that's not owned directly by Acme either, is it? A. No, sir.

Q. But it's owned by the same people who own Acme? A. That is.

Q. Who are the owners of Acme Quilting? [834] A. I have two partners: Ephraim Young, Herbert Goldman and myself.

Q. And you each own one-third of the company? A. We each own one-third of the common stock, yes.

Q. And do you each own one-third of the company that owns and runs the factory in Hanover, Pennsylvania? A. We each own one-third of that company, yes, sir.

Q. And do you each one-third of the company that owns and runs the factory down in Tunica, Mississippi? A. Yes.

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

Q. Do you each own one-third of the company that owns and operates the bedspread warehouse retail outlets in Florida? A. No, sir.

Q. Do you own a portion of it? A. Yes, I own a portion.

Q. Does either Mr. Young or Mr. Goldman own a portion of those retail outlets?

Mr. Kreindler: Objection, your Honor. I don't know what this has to do with anything.

The Court: I will permit it. Overruled. You may answer.

A. Mr. Young, Mr. Goldman and I each own a portion of that.

[835] Q. And you have some other partner or partners? A. Yes.

Q. Is there a retail outlet at the plant in Hanover, Pennsylvania? A. Yes, there is.

Q. And is that owned and operated by another company besides Acme and the company that owns the plant? A. Yes. It is another corporation.

Q. Are you an owner of that corporation? A. Yes, I have a stock interest in that corporation.

Q. Do the bedspread Warehouse retail outlets in Florida and the retail outlets at the Hanover plant sell Acme manufactured products? A. Among others, yes.

Q. Are those products sold by Acme to those companies? A. Those products that they sell that are manufactured by Acme, yes, we sell those products to the stores.

Appendix—Exhibit 5—Trial Testimony from the Re-trial of Acme's Counterclaims in Civil Action No. 77 Civ. 2004 (CBM) Pages 794, 800, 816-820, 833-835, 841-844, 850, 1084 and 1089.

Q. And do you include—excuse me.

When you provided the financial information to Dun & Bradstreet with respect to sales and profits for the various years, did you include in that information

* * *

[841] A. Yes, I am.

Q. So that would be substantially your fiscal year ended January 31, 1980? A. That's correct.

Q. Then, as I understand it, in that 1979 year that you have been talking about when your percentage of total sales represented by adult mattress pads declined from about 65 to about 61 per cent, your total sales volume went down several hundred thousand dollars, is that right? A. Approximately, yes.

Q. And your net profits went up from 40,000 to $69,000, is that right? A. I believe our profit that year was about $100,000 before taxes.

Q. Which year? A. The year ending January 31, 1980.

Q. And what about the prior year where the statement shows $40,000, what was your net profit then? A. I believe it was higher than that. I think it was—I can't recall exactly, but it was sixty or so. I can't recall at the moment.

Q. You did pretty well with respect to the following year? A. I am a little nervous now. I have to admit [842] my memory isn't quite as good. I probably will get to it before we finish.

Q. '76, when it was 90,000, you said it was actually about 170? A. 170-odd thousand, yes.

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Q. '77 where the statement shows a profit of 89, would you say the profit before taxes again was about 170? A. I believe it was around 150 or a little less.

Q. And in the year ended January 31, '78, when the net profit reported was 92,000, again was the profit before taxes larger? A. Isn't that the year we are talking about? We are talking January 31, 1978?

Q. Yes. The statement shows—

The Court: Calendar '77 is what we are talking about.

Q. Look at the front page of Perfect Fit Exhibit 16, the April 30, '79, statement. A. Okay. We are talking in January '78, I believe our profit before taxes was approximately $150,000.

Q. And after taxes it was $92,000? A. That's correct.

Q. And the following year when it was 40,000, you [843] say it was about 60, is that right? A. Well, as long as we are here I will see if I have any other figures.

Yes, that would be it roughly.

Q. You just looked at something that refreshed your recollection? A. No. I was just thinking about it.

Q. So that in that year, what you would call 1978, the one ended January 31, 1979, you actually— A. That's correct.

Q. —had these profits on sales of about 60 and the statement shows 40 after taxes? A. You know, I think that our profits were lower than that. I think that they were—they were considerably lower than that, and I can't recall.

Q. Considerably lower than what? A. Lower than the 40. I think that they were perhaps around 25,000.

Q. You just looked at the June 11, 1979, report, page 2, didn't you? A. Mr. Gordon, I might have looked at anything, but I am just recalling that our profits were in that area of about $25,000 that year.

Q. As a matter of fact, the statement shows net [844] profits of $40,750, doesn't it? A. Which statement is that? On January 31, 1979, there is—it shows a profit of $40,000, that's correct. That's after taxes.

Q. After taxes? A. Yes.

Q. And what was your net profit that you earned from the operation of the business before taxes for that year? A. It was about $25,000. In other words, I believe we had a tax refund that year.

Q. You made $24,189 in net income on sales of $22,700,000 right? A. Yes, sir.

Q. And your statement shows a net profit after taxes of $40,000 because instead of paying taxes you got a tax credit? A. That's correct.

Q. Isn't that a tax credit that carried over from year to year? A. Isn't that a tax credit that carried over?

Q. Yes, sir. Didn't you have a tax credit in your prior fiscal year that ended January 31, 1978?

* * *

[850] Q. Yes. Make it "Estimated profits before taxes paid or refunded."

Would that be more accurate? A. Estimated operating profit before taxes?

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Q. All right. A. Okay.

Q. Now, for that first year what would that number be? A. I don't recall.

Q. All right. Do you want to put a question mark there? A. All right.

Q. How about for the second year? A. Approximately 174,000.

Q. Do you want to enter that in there? A. All right.

Q. What about the next year? That's your 1977. A. Approximately $150,000.

Q. And how about for the following year? A. Approximately 25,000.

Q. And now we come to your 1979. A. Approximately 100,000.

Q. Thank you.

* * *

[1084] A. I think that's a fair statement. A lot of people use that. Yes.

Q. So when you subtract cost of goods sold from your net sales, you get your gross profit, which is the thing you referred to as 25 to 30 per cent? A. Yes.

Q. Would you take a look at one of your Dun & Brandstreet reports to this exhibit—would you take a look at the one dated June 11, 1979, page 2? A. Financial statement?

Q. Page 2. That's the one that shows the summary of your profit and loss statement. A. Yes.

Q. Do you see where it says net sales, 22,700,000-some-odd? A. Yes, I do.

Q. The cost of goods sold, 19,570,000? A. Yes.

Q. And a gross profit of 3,174,000, in round numbers? A. Yes, I do.

Q. Does that represent a 14 per cent gross profit on sales rather than a 25 to 30 per cent gross profit?

* * *

[1089] statement that you handed me, part of Exhibit whatever it is in evidence—

Mr. Richards: 13.

Q. —and tell me whether that is the same number they have in the report?

Mr. Kreindler: I object to this.

The Court: I will sustain the objection.

Q. Tell me what figures they transposed or changed or put into a different place in the Dun & Bradstreet report as opposed to in your financial statement.

The Court: Overruled.

A. Mr. Gordon, it will require a little explanation, if I can give it to you. May I?

The Court: Certainly. Tell him what it is. Do you need the two reports?

Q. Do you want to look at your statement compared to the report? A. No, I am familiar with how they are made up. The particular financial statement you have is on Acme Quilting Company, Inc. We have to keep in mind that while Acme Quilting Company, Inc., is a viable organization, it is essentially a selling organization and how it does must take into consideration the operations of the manufacturing affiliates.